

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

|   |   |          |
|---|---|----------|
| In the Matter of                          | ) |          |
|   | ) |          |
| Joint Petition for Rulemaking to Resolve  | ) | RM-10865 |
| Various Outstanding Issues Concerning the | ) |          |
| Implementation of the Communications      | ) |          |
| Assistance for Law Enforcement Act        | ) |          |

**REPLY COMMENTS OF THE  
CENTER FOR DEMOCRACY & TECHNOLOGY**

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Dated: April 27, 2004

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The Center for Democracy & Technology (“CDT”) respectfully submits these Reply Comments on the Joint Petition for Expedited Rulemaking (the “Petition”) for the sole purpose of bringing to the attention of the Commission a report issued on April 7, 2004, by the Office of the Inspector General of the U.S. Department of Justice, entitled “Implementation of the Communications Assistance for Law Enforcement Act by the Federal Bureau of Investigation,” available at <http://www.usdoj.gov/oig/audit/FBI/0419/final.pdf> (hereafter “OIG Report”).

The OIG Report makes three points crystal clear, each of which strongly supports the rejection of the Joint Petition’s effort to extend CALEA to the Internet:

**1. CALEA is fundamentally broken**

Perfection is the enemy of the good. The FBI’s “punchlist mentality” and its quest to impose 100% of its demands have fundamentally broken the CALEA process. The OIG Report explains in detail – from the law enforcement perspective – how fundamentally broken CALEA

is. The Report complains that CALEA compliance in the wireline telephone world stands at less than 20%, OIG Report at 13. Yet a close reading of the OIG Report reveals two key causes of the delay in full compliance. First, the FBI was unwilling to accept 95% of its demands and thus caused at least five years of delay by fighting to achieve 100% of its demands. And second (as discussed in the next section), CALEA implementation has proven to be vastly more expensive and disruptive than Congress ever anticipated.

On the first point, in December 1997, the telecommunications industry issued its “J-Standard” guaranteeing law enforcement access to all content of surveilled communications and meeting the vast majority – but not 100% – of the FBI’s demands for individually broken-out and formatted items of signaling information. Although the industry had spent two years working with law enforcement, and bent over backwards to accommodate law enforcement, it wasn’t good enough for the FBI. The FBI challenged the standard, launching almost five years of litigation and dispute over the last few percentages of coverage. At bottom, the FBI’s “punchlist mentality” and its desire to force carriers to provide the punchlist features – even those that went beyond traditional interception capabilities – was a fundamental cause of the delay in CALEA compliance.

Entirely apart from the statutory reasons to reject the FBI’s petition set out in CDT’s original Comments, CDT respectfully submits that it would be an enormous mistake to impose this fundamentally broken regime onto the Internet.

## **2. The costs of CALEA compliance appear to be much higher than Congress anticipated**

According to the OIG Report, the government alone has spent almost half a billion dollars on CALEA compliance efforts (almost exhausting all funds appropriated for such

compliance) and yet has achieved only 20% compliance in the wireline world. Moreover, as the FBI makes clear in its petition, it believes that industry should bear all of the remaining costs of CALEA compliance. CDT again respectfully submits that it would be an enormous mistake to place this kind of financial burden on the Internet.

**3. The OIG Report effectively agrees with the comments of CDT and other commenters – the FBI must go to Congress to achieve what it asks for in its Joint Petition**

The bottom line conclusion of the Office of the Inspector General of the U.S. Department of Justice is that to address “emerging telecommunications technologies” the FBI must seek relief *from Congress*. OIG Report at 19-20. According to the OIG Report, “we believe that the legal changes addressed below will, if recommended by DOJ and adopted by Congress, also assist the FBI in meeting the challenges of rapid technological change in the telecommunications field.” OIG Report at 20. The third of three recommendations of the OIG Report is that the FBI should:

Submit to Congress CALEA legislative changes necessary to ensure that lawful electronic surveillance is achieved expeditiously in the face of rapid technological change.

OIG Report at 25.

Precisely as CDT and many other commenters stated in the initial comments: the law enforcement concerns are important concerns that should be addressed, but it is for Congress, and not the FCC, to address them.

For all these reasons, and the reasons set out in CDT’s original Comments, the Commission should deny those portions of the Petition that ask the Commission to (a) extend the reach of CALEA to broadband Internet access, or to VoIP or other information services, (b)

create a review process for future technology, or (c) create new procedures and enforcement mechanisms different from those already in the statute. The Commission should acknowledge the importance of the issues raised by the Petition, but defer to Congress for their resolution.

Respectfully submitted,

/s/

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